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# Westmoreland v. CBS

## Reflections on a major media event — and the issues it did not resolve

by KAREN ROTHMYER

**A**t one point in late January of this year, three trials involving major news organizations were going on simultaneously in the U.S. federal courthouse in lower Manhattan. At some moments during that brief period, it appeared that the stately granite court building, situated in a cluster of government offices just north of the financial district, was virtually under siege by an attacking army of cameramen. Coming out of the building at the end of the day, one could play for a moment at being a celebrity about to face an array of popping flash bulbs in some thirties-style Hollywood film.

On the main floor was the libel trial that pitted Time Inc. against Israeli government minister Ariel Sharon. Directly above the Sharon courtroom, in a high-ceilinged chamber overrun with hundreds of yards of television monitor cables, was the CBS-Westmoreland trial, in which retired General William Westmoreland contended that CBS had libeled him in a 1982 documentary titled "The Uncounted Enemy: A Vietnam Deception." And finally, on the thirteenth floor of the courthouse, in a small wood-paneled courtroom in the central core of the building, the Justice Department was seeking the criminal conviction of reporter R. Foster Winans, whom it accused of leaking information about stories that were to appear in *The Wall Street Journal*.

Altogether, by rough count, well over a hundred journalists were on hand to cover the three events, elbowing each other in the cafeteria lines, tying up the few public phones in the courthouse, and stopping to talk with acquaintances who were covering — or in some cases being called as witnesses in — one or another of the trials in the building. While it was coincidence that the three cases were being tried when and where they were, for those covering the trials there was a symbolism in the convergence that could not be ignored: journalism was on the hot seat.

The Sharon and Winans trials each raised issues about journalistic practices and ethics which were duly examined and discussed as those cases unfolded. But from the start it was the Westmoreland trial, in which Westmoreland claimed that CBS had inaccurately portrayed him as having attempted to deceive his superiors regarding the true size

of enemy forces in Vietnam, that drew most of the public attention. No doubt much of this had to do with the personalities and issues involved: Vietnam and a New Right-backed attack on a major network represented a powerful combination of fascination and glamour. Through the deepening gloom of the midwinter afternoons, the erect, white-haired figure of General Westmoreland provided a constant point of focus at the courtroom's front table, while, at the defense table, the trio of CBS defendants offered a study in somber contrasts: George Crile, the producer of the documentary, attentive and expressionless; Mike Wallace, the correspondent on the show, generally slumped in his chair; and Sam Adams, the CIA analyst turned CBS consultant, filling up page after page of yellow legal pads.

One had only to look at the composition of the press corps to appreciate that the Westmoreland case was considered by editors and producers around the country as a big story. Overwhelmingly male (a notable exception was Eleanor Randolph of *The Washington Post*) and overwhelmingly white, the members of the press contingent gave the impression, as one reporter put it, that they were the ones in their organizations "marked out for success."

**A**nother element as well imparted significance to the trial: the flap over the documentary coincided with, and perhaps served as a stimulus to, an extended period of media self-examination. Typical of the flurry of articles and speeches it helped to generate was one in which Gannett chairman Allen H. Neuharth warned the National Newspaper Association convention in September 1984 of a "rising tide of public opinion that feels the press is distorting the public's view of life. . . ." In that atmosphere, journalists covering the Westmoreland trial were keenly aware that they were serving not only as recorders of matters directly affecting their profession's reputation but also as grist for others' reports. "We live in a media-conscious society," Van Gordon Sauter, executive vice-president of the CBS Broadcast Group, commented on the day Westmoreland dropped his suit. "One reason is because the media have discovered the media."

Despite the enormous import attached to the trial, what actually transpired in Judge Pierre Leval's courtroom proved

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far less substantial than its billing had promised. Insights into Vietnam policy were few, in large part probably owing to Judge Leval's insistence that discussions range no farther than necessary from the single issue of Westmoreland's purported deceit. (The one major exception was the testimony of former Secretary of Defense Robert McNamara, who revealed himself as now believing that he had been well-known as an opponent of the war from the mid-1960s on.) With regard to the inner workings of CBS, the trial failed to look deeply into the general methods and mores of the network. In part, this may have been because Westmoreland's lawyer, Dan Burt, chose to focus on the question of the truthfulness of the broadcast's allegations, leaving very little time out of the 150 hours allotted to each side to present its case to call witnesses from CBS. But in the few cases of CBS witnesses who did take the stand, Burt — who, unlike David Boies, the highly skilled CBS lawyer, had never before tried a case in court — seemed unable to make much of anything of the charges originally leveled against the network.

The final blow, of course, to any prospect of the trial's providing either legal precedents or historically significant judgments was the fact that the case never went to the jury. On February 18, just days before CBS was to rest its case, Westmoreland decided to drop his \$120 million suit. But to say that the trial therefore amounted to the transformation of a mountain into a molehill would be to ignore what went on outside the court.

**P**ublic discussion of the events recounted in the CBS documentary started almost immediately after the program's airing on January 23, 1982. But what caused the debate to begin in earnest was a cover story in the May 29, 1982, *TV Guide* titled "Anatomy of a Smear" that attacked the program's journalistic practices. Almost immediately, CBS set up an inquiry whose conclusions were highly critical of the making of the program. Crile himself was suspended by CBS in 1983 when it was discovered that he had taped at least four people on the telephone without their permission, a violation of the network's guidelines. (The suspension was lifted before the trial began.)

According to David Henderson, a Washington lobbyist who served as Westmoreland's unofficial spokesman during the trial, Westmoreland wanted from the start only an apology, not courtroom vindication. "This effort was never viewed as one of trying to punish the media," Henderson said in an interview shortly before the case ended. Similarly, Dan Burt, head of Capital Legal Foundation, which volunteered to take on the case for nothing, consistently said that his reason for doing so was "to clear the name of a general." Throughout the case, however, Burt affected the stance of one who saw the media, and CBS in particular, as a dangerous giant that had to be cut down to size. In a frequently quoted comment to *USA Today* reporter Ben Brown in 1983, Burt said, "We are about to see the dismantling of a major news network." (Burt later said he had been misquoted; Brown says he was not.)

Among those who funded the efforts of Burt and his legal firm were several major New Right charitable organizations, most notably those associated with Richard Mellon Scaife, publisher of *The Sacramento Union* and the Greensburg, Pennsylvania, *Tribune-Review* (see "Citizen Scaife," *CJR*, July/August 1981). Burt told *The Washington Post* after the trial was over that Scaife, who has underwritten much of the New Right movement, had contributed more than \$2 million of the approximately \$3 million cost of the case. Scaife was unavailable for comment.

Another conservative funder of the case was the John M. Olin Foundation, which gave Capital \$235,000 between 1982 and early 1985. "I thought the case would air the limits of the media and the role they play," said Michael Joyce, executive director of the foundation, in an interview just before the case ended. As Joyce sees it, the media have become more powerful as a result of the centralizing of power in the country, and "I do not readily see where the checks on that power are." Noting that he regards print as "much less of a problem" than broadcast, and disavowing any belief that there is as yet any proven clear-cut link between what he regards as the liberal bias of the media and media coverage, Joyce said his main concern is the professional competence of media practitioners. "Journalists think of themselves as professionals and don't behave as such," Joyce added.

Joyce said there is no relationship between his goals and those of other New Right organizations such as Accuracy in Media, whose actions he described as "media-bashing," or of the newly formed Fairness in Media, whose attempt to influence CBS policy through purchases of the network's stock Joyce described as ill-conceived. Yet another New Right group to advance criticism of CBS was the American Legal Foundation, founded in 1980 with the assistance of a grant from Scaife. The foundation filed a complaint about the Westmoreland documentary with the Federal Communications Commission; it was rejected in a staff ruling in early March. However, Michael P. McDonald, general counsel to the ALF, said he expected to appeal the decision to the full board and, if turned down there, to take the case to federal court.

**N**egative feelings toward CBS were not restricted to those outside the profession. One striking thing about the Westmoreland trial was the way in which it brought to the fore the real but often unacknowledged hostility between print and broadcast. Many print journalists seemed to approach the trial predisposed against CBS on the ground that TV is incapable of doing anything approaching serious journalism. Patrick Owens, a *Newsday* reporter, noted in a February 9 analysis piece just before the trial ended that H. L. Mencken once described the primary aim of many newspaper people he had known as being "to please the crowd" by "first selecting a deserving victim and then putting him magnificently to the torture." Newspapers, Owens wrote, "are often higher-minded now," but, he went on, "Television . . . has dedicated itself to Menck-

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en's dictum with extraordinary singlemindedness." Owens then proceeded to argue his point, using the Westmoreland documentary as a prime example.

Another reporter said over lunch one day early in the trial that the big salaries TV journalists make are at the root of what he said was their shoddy work, as exemplified by the documentary. "Their big salaries make them feel that what they do must be important," he said. Harold Fruchtbaum, a historian who was sitting in on the trial, told of an incident that seems to suggest that, whatever else money does, at times it provides the balm to heal TV reporters' hurt feelings. One day, he said, a TV reporter covering the trial made the comment after a bruising put-down by a print reporter, "Well, my only consolation is that I make a hell of a lot more money than he does."

For all the hostility expressed by print toward broadcast, however, Mike Wallace for one didn't think it affected the actual coverage of the trial's day-to-day proceedings. "They did come in skeptical — almost, as it were, with a chip on their shoulder," he said, referring to the print reporters. But, he added, he believes they were won over by the evidence that was presented. "By and large, with a few notable exceptions, they did a superb job," he said. "They were fair all the way."

**T**he depth of print-broadcast hostility was not the only unexpected revelation of the trial. After nearly three years of hearing about how arrogant and untrustworthy the public considers the media to be, it was something of a surprise to find that out of the first full panel of potential jurors, drawn from New York City and its northern suburbs, not a single person admitted to a strong dislike of the press. Asked specifically what they thought of CBS, one juror agreed with the statement that the network was generally fair in its news and documentary programs and one thought the picture was mixed, but most had no opinion. On the general subject of how the news media had reported the war in Vietnam, most had no opinion.

The jury panel's views raise questions about just what can be made out of the many surveys of public attitudes that were cited repeatedly in discussions of the Westmoreland and other libel cases. Typical of such surveys was a *Newsweek* poll reported in the magazine's October 22, 1984, issue which found that only 34 percent of those questioned had "quite a lot" or "a great deal" of confidence in newspapers and only 26 percent felt the same about television. (The margin of error was such that the results for both could have been identical.) At the same time as such figures were being quoted, however, Deanne Termini, senior vice-president of Belden Associates, a Dallas firm that specializes in marketing research for newspapers, was telling *Editor & Publisher* that three-quarters of adult respondents to Belden's surveys said they found their local papers to be fair and believable. Elaborating on those remarks, Termini said that, while Belden has done no comparable studies on television, such questions as have been asked point to a similar positive feeling about local broadcast news.

In the end, of course, after serving for four months as the subject of much speculation, the views of the jury became legally irrelevant. They were nonetheless interesting for what light they shed on what a small group of "the public" thought of the evidence presented. According to one juror quoted in *The New York Times*, an informal estimate made by her and two other panel members near the end of the trial came up with a figure of seven or eight jurors leaning toward CBS, with the others undecided or leaning toward Westmoreland.

**O**ne revelation to emerge from the trial was the seemingly inordinate attention those in charge of the Vietnam War paid to the press. Over and over again, in testimony and declassified documents, the impression was conveyed that American officials in Saigon and Washington were fighting the war with one eye on what was happening in the field and the other on how it was being reported — or might be reported — by the media. In one August 1967 cable from Ellsworth Bunker, the U.S. Ambassador to Saigon, to Walt Rostow, President Johnson's special assistant for national security affairs, Bunker warned that the CIA was going to hold out for higher estimates of the enemy than those favored by the top military commanders. "I need hardly mention the devastating impact if it should leak out (as these things so often do) that despite all our success in grinding down VC/NVA here, CIA figures are used to show that they are really much stronger than ever," Bunker wrote. "Despite all caveats, this is inevitable conclusion which most of press would reach."

In his testimony on the witness stand regarding the dispute over enemy strength, Westmoreland, a courtly and dignified figure who was probably his own best witness, explained that his concern about the numbers used by the media was related to his concern for his troops. "Sure we were sensitive to press reaction," Westmoreland said. "We would have to be dummoes if we weren't. I felt an obligation to my troops that what they were doing be given the credit that they deserved, and to come out publicly with a statement they were fighting over a hundred thousand more people than we said we were fighting, which was a distortion — the additional people were not fighters . . . would have been terribly detrimental to the morale of my troops."

In a December 23, 1984, article on discussions between military and political officials in Washington and Saigon, *Washington Post* reporter Eleanor Randolph noted that when an official report on enemy strength was released in the fall of 1967, the new figures were presented in such a way as to show an actual decline in the enemy totals, thanks to the dropping of an entire category of supporters. "Many reporters bought the line," Randolph wrote. "Among the few publications that appeared to go beyond it were *The New Republic* and *The New York Times*. . . . But most reporters either shrugged off the numbers, deciding that the latest quantification of a victory by the military brass was nothing new, or believed them."

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If the Westmoreland case had gone to the jury, it appeared from testimony and from some of the jurors' comments that the issue of the truth of the documentary might have prompted extended deliberations. Burt, Westmoreland's lawyer, did present considerable evidence that the general's superiors knew about the numbers controversy. While technically, in some cases, Westmoreland may have withheld figures from the Joint Chiefs, what seemed to emerge from the testimony was a picture of widespread agreement on the part of top political, intelligence, and military officials to deceive not each other but the press and the American people. (Still, the jury might have wondered, if Westmoreland was only a part of a process, was he libeled if CBS portrayed correctly the gist of what was going on but erred in putting too much of the blame on him?)

On the issue of malice, it appeared likely, based on jurors' comments as well as on the testimony at the trial, that CBS would not have been found guilty of malice — an essential finding in cases involving a public figure like Westmoreland. In Judge Leval's courtroom, the tight shots of Westmoreland licking his lips and the lack of nuance that made the documentary so gripping when originally aired now made it seem somehow just a little too prosecutorial and seamless. But CBS was also shown to have done a remarkable job not just of researching the story but of getting those who could tell it — top career military and CIA officials — to agree to appear on the screen. Crile, the producer, appeared on the stand to be in total command of the material in the broadcast, knocking down any impression that consultant Sam Adams, whom Burt tried to paint as obsessed, was actually the mastermind behind the program.

Moreover, the charges leveled in the *TV Guide* article and repeated by Burt seemed for the most part to diminish in significance when explored at the trial. For example, *TV Guide* charged, and the internal CBS report prepared by Burton Benjamin substantiated, that in some cases events were misrepresented so that, as Burt pointed out at the trial, a quote referring to one thing might actually appear to be referring to something else. In one case that Burt made much of, retired Colonel Gains Hawkins appeared to be describing a set of figures presented at a key meeting on enemy strength as "crap." In fact, as Burt brought out at the trial by showing outtakes of Hawkins's interview, Hawkins was actually talking about an earlier set of figures. But on the witness stand Hawkins said that all the figures — old and new — were "crap," thus showing that while a journalistic corner had been cut, deliberately or otherwise, the substance of what Hawkins said was unchanged. Similarly, *TV Guide* charged that General Joseph McChristian, head of intelligence in Vietnam under Westmoreland, never told Crile that Westmoreland was "suppressing" his report on increased enemy strength, as Westmoreland's action was characterized in the program. On the witness stand, however, McChristian testified that Westmoreland did not send his cable forward and that "The only concern that General Westmoreland expressed to me was the political one."

Another charge made by *TV Guide* was that the documentary coddled sympathetic witnesses while grilling un-

friendly ones. As an example of the former, *TV Guide*, later backed up by the Benjamin report, cited the re-interviewing of retired CIA official George Allen. On the witness stand Crile explained that the second interview had been mutually agreed to in order to let Allen have another chance to overcome his initial reluctance to open up — a claim that Allen's own statements tended to support. He had had "no desire to blow the whistle," Allen testified, discussing his attitude toward public airing of the intelligence dispute. Thus, what seemed at first examination a serious breach of journalistic ethics, quite apart from its being a violation of CBS guidelines, appeared upon further examination a judgment that could certainly be questioned but not necessarily condemned. As an example of the "grilling" issue, *TV Guide* cited the CBS interview of Westmoreland, whom it described as only vaguely aware of what was to be asked of him. On the witness stand, the general said, "Let's face it, I was ambushed." Under cross-examination, however, Westmoreland's contention seemed to lose some of its edge when he acknowledged that, in order to prepare himself for the CBS interview, he had visited the Army History Center at least once, and possibly twice, to review preparations for the Tet offensive.

Probably the charge made by *TV Guide* (and backed up by the Benjamin report) that seemed to have the most merit, based on evidence at the trial, was that Crile permitted almost no dissenting voices to be heard in the documentary. The most egregious example of this appeared to be the case of former Commander James Meacham, now a military affairs writer for *The Economist*. At one point in Crile's interview of Meacham, shown in its reconstructed form to the jury, Meacham said sharply, "You're trying to get me to say we falsified intelligence. I'm not going to say it." On the program itself, the only piece of his interview that was quoted was a few lines supporting the program's basic thesis.

Crile testified on the stand that he believed that Meacham, years after Vietnam and in a very different position than he had been in then, did not wish to criticize the American military. This may well be the case. However, it would appear to be a basic tenet of good journalism that no matter how clear the thesis one has in one's mind at any given time, one simply must acknowledge the presence of conflicting points of view, however seemingly lacking in merit, when one comes across them. In Meacham's case, the basic thrust of his interview was ignored.

There were other charges, more related to attitude than to specific instances of possibly unethical conduct, which could perhaps have done more to persuade the jury to be suspicious about the documentary-makers' good faith than those that Burt emphasized. At one point, for example, Crile acknowledged on the stand that he had surreptitiously taped "six or seven" telephone conversations, more or less at random, for the broadcast, testifying that "I don't know if I could give you an exact reason" for the taping. Burt hardly paused after Crile's courtroom admissions. Seemingly unaware that he had not driven home in any substantial way

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to the jury the cavalier attitude Crile's remarks might be seen to reflect, he quickly moved on to his next point.

In another case, testimony that could have been highly damaging to the defendants was heard only in the briefest possible form because Burt ran out of time. Howard Stringer, the executive producer of the broadcast, was to have appeared as a witness, but instead Westmoreland's lawyers quoted to the jury from tape-recorded conversations Stringer had had with one of the authors of the *TV Guide* piece. Said Stringer in one of those conversations, "If Westmoreland was involved in a conspiracy, the real question is, Would he really have the nerve to defy Washington? The chances are there would be a coverup there, too. You could go on with that indefinitely. But George is a conspiracy thinker." In another portion of the conversations, as recounted to the jury, Stringer said that "the last month or so before this went on the air . . . I did not give this broadcast the attention I should have . . . I didn't vet it enough." What Stringer did was to raise questions not just about Crile but also about the care exercised by CBS's top management in making what was bound to be one of the most explosive programs it had aired in years. But again, as with the Crile taping, the Stringer testimony came across as hardly more than a ripple on the tide.

**F**inally, there was the matter of the Benjamin report, which CBS had attempted to keep confidential. When he won release of the report, Burt exulted in it as a major victory for his side. However, in a possibly key ruling, Judge Leval determined part-way through the trial that the major conclusions of the report could not be revealed to the jury. Leval said, in effect, that it was the jury's job to ascertain the truth of the broadcast and the care with which it was made within the context of what was said in the courtroom, independent of outside yardsticks. He also noted that the Benjamin report addressed the question of whether the broadcast was fair, which was not at issue in the suit. "A publisher who honestly believes in the truth of his accusations (and can point to a non-reckless basis for his beliefs) is under no obligation under the libel law to treat the subject of his accusations fairly or evenhandedly," Leval wrote. While it may be that the jury would have conducted its deliberations in exactly the same way if the report had been admitted into evidence, it is also possible that the jury's awareness of the report might have set a different tone for those discussions.

So we are left not just with many unanswered questions about Westmoreland and CBS, but also with the aftermath of three years of scrutiny and debate. One veteran CBS producer remarked near the end of the trial that, whatever the final outcome, it seemed from what he had observed that everyone who had been in any way touched by the case had been hurt just by the very act of involvement. On a broader scale, he said, more pages had been added to the CBS guidelines over the past couple of years but beyond that he didn't see much change. One nice thing about the trial, he observed, was that it kept a lot of the top brass busy so that the rest of the network could get on with reporting the news. ■